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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

On Appeal from the United States District Court of the Northern District of California

Brief of Appellees

EUGENE M. SWANN
JOHN DIAZ COKER
JAMES M. KLEIN
TERRENCE RICHARD VAN OSS
CONTRA COSTA LEGAL SERVICES FOUNDATION
337 Tenth Street, P. O. Box 1669
Richmond, California 94801

KENNETH F. PHILLIPS
STEPHEN P. BERZON
NATIONAL HOUSING & ECONOMIC DEVELOPMENT LAW PROJECT
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for Appellees

PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

October Term, 1970

No. 507

California Department of Human Resources Development, et al.,
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v.

Judith Java, et al.,
Appellees.

On Appeal from the United States District Court of the Northern District of California

Brief of Appellees

OPINION BELOW

The opinion of the United States District Court for the Northern District of California is reported at 317 F. Supp. 875 (1970). It is also included in the Joint Appendix at 133.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state . . . shall . . . deprive any person of life, liberty or property without due process of law. U. S. Const. Amend. XIV, Section 1.

42 U.S.C. 503(a)(1) provides:

> § 503. STATE LAWS, PROVISIONS REQUIRED: STOPPING PAYMENTS ON FAILURE TO COMPLY WITH LAW
>
> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
>
> (1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due;

Section 1335 of the California Unemployment Insurance Code provides as follows:

> 1335. If an appeal is filed, benefits with respect to the period prior to the final decision on the appeal shall be paid only after such decision, except that:
>
> (a) If benefits for any week are payable in accordance with a determination by the department irrespective of any decision on the issue set forth in the appeal, such benefits shall be promptly paid regardless of such appeal, or
>
> (b) If a referee affirms a determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under Section 1336 or otherwise by the

director, Appeals Board, or other administration body or by any court.

If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination.

QUESTIONS PRESENTED

1. Is a procedure that assures the withholding of weekly unemployment benefits for lengthy periods from recipients who have been found eligible after State investigation "reasonably calculated to insure full payment of unemployment compensation when due," as required by 42 U.S.C. 503(a)(1)?

2. Does a procedure which cuts off unemployment benefits from eligible recipients without a prior hearing pending a decision on an employer's appeal violate due process of law?

STATEMENT OF CASE

This class action challenges that part of Section 1335 of the California Unemployment Insurance Code which prohibits the continued weekly payment of unemployment insurance funds to recipients who have been determined eligible by a State investigation but whose last employer has appealed that decision to a State referee.

Appellees Java and Hudson and the class they represent are wage earners, recently out of work, and unable to find new employment. Prior to their loss of employment, they earned sufficient wages in employment covered by the California Unemployment Insurance program to qualify for the receipt of benefits. They filed claims for unemployment benefits, and, after an eligibility investigation by the California Department of Human Resources Development [hereinafter "Department"] based on information provided

by all relevant parties, were determined eligible and began receiving weekly benefits. Sometime thereafter, their determinations were appealed to a State referee by their last employers. Pursuant to California Unemployment Insurance Code § 1335, no further payments were permitted pending decisions on appeal, despite the fact that the Department's favorable eligibility determinations remained unchanged. In the interim, both Mrs. Java and Mrs. Hudson were forced to apply for welfare to support their minor children.

Prior to the referee hearings, this action was filed to enjoin enforcement of Section 1335 on the ground that plaintiffs, as *eligible* recipients, had a constitutional and federal statutory right to the continuation of their benefits pending their former employers' appeals. On May 14, 1970, the three-judge district court issued a preliminary injunction enjoining the State from suspending the unemployment benefits of eligible recipients "on the ground that an eligibility determination has been appealed except after a prior hearing in accordance with the principles enunciated in *Goldberg v. Kelly.*" (A. 140).

After reviewing the Department's eligibility determination in great detail, the court found that it is based on a thorough investigation with all sides having an opportunity to be heard and "is the critical point in the California procedure." (A. 136). Relying on *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the court below held that suspending unemployment benefits from an *eligible* unemployment recipient pending an employer appeal without affording the recipient a *prior* opportunity to be heard violates due process.

Moreover, the court found that because of suspensions pending appeal:

> Some five thousand *eligible* recipients each year in California find their payments halted for a median period of seven weeks. Since the average period of unemployment in California is . . . some nine weeks, [the median period of unemployment is seven weeks. (A. 11)], it is clear that as to these people, payments are not made "when due." (A. 139).

The court also noted that lengthy suspensions of unemployment benefits serve to drive unemployment recipients to welfare—a result directly contrary to the Congressional purpose in enacting the Social Security Act (A. 130). Basing its holding on these two factors—that benefits are delayed beyond the time the average recipient has need of them, and that relegation to welfare was one of the consequences of unemployment that Congress meant to prevent—the court held that California's procedures under Section 1335 were not reasonably calculated to assure full payment of unemployment benefits when due and therefore violated the Social Security Act (A. 139).

The injunction issued by the district court has been in continuous effect since May 24, 1970. Since that date, all eligible unemployment recipients have received weekly benefit payments pending their employer's appeal.

It is well to clarify at the outset what is *not* involved in this case. Appellees raise no issue concerning the procedural safeguards to be afforded claimants who are initially determined *ineligible* and file appeals from that decision. This factual situation is clearly distinguishable from the one before the Court: the appellees have been found *eligible* by the State for unemployment benefits, and their benefits have been cut off solely due to an employer's appeal.

Further, this case does not involve an unemployment insurance procedure wherein a claimant is eligible for benefits merely by filing a prima facie claim, with no Departmental

investigation until an employer files an appeal asking to present his side of the case. On the contrary, the California claimant does not receive benefits until after his employer has been notified of the claim and has had an opportunity to present his evidence to the Department examiner. The claimant and his employer are provided opportunities to rebut each other's statements, both orally and in writing. The Department examiner makes a written decision only after extracting and weighing the evidence submitted by all sides (A. 136, 117-123).

Finally, this is not a case in which an employer who is successful in appealing a state eligibility determination is individually responsible for payments made pending appeal. If a California employer succeeds in reversing a determination of eligibility at any appellate level including judicial review, he is not individually liable for any benefit payments made as a result of that determination. *Cal Unemp. Ins. Code* § 1335.

SUMMARY OF ARGUMENT

I

In enacting the Social Security Act, Congress intended unemployment compensation to serve three distinct purposes: (1) to enable workers to survive temporary periods of unemployment without having to resort to relief, (2) to help workers in their efforts to find reemployment, and (3) to maintain purchasing power at the onset of an economic downturn. These objectives all require the payment of weekly unemployment benefits during the initial stages of unemployment. In order to assure that unemployment benefits be payable and due to workers at this time, Congress provided that State unemployment procedures "be reasonably calculated to provide full payment of unemployment compensation when due." 42 U.S.C. 503(a)(1).

In California, an initial eligibility determination is made on the basis of a thorough factual investigation affording all parties an opportunity to be heard. Once determined eligible, a claimant begins receiving benefits. Upon an appeal by an employer to a State referee, all benefits are immediately cut off pending the decision on appeal. A median period of seven weeks passes before such decision is rendered. *Calif. Unemp. Ins. Code* § 1335. In deciding whether to suspend benefits, no consideration is given to the merits of the recipient's case.

If the initial eligibility determination is affirmed by the State referee, as 64 percent are, payments are made retroactively in a lump sum. Since the median length of time an unemployed worker is entitled to receive benefits is also 7 weeks, it is probable that an *eligible* employee, whose employer has filed an appeal, will receive no benefits until a time in which he is no longer qualified for unemployment compensation. In the interim, although found fully eligible for benefits by the relevant State agency, he somehow is required to survive without the use of unemployment funds.

By assuring that a large number of *eligible* employees do not receive benefits until long after their initial period of unemployment, the California disbursement procedures undermine all three objectives of the federal statute—especially the desire of Congress to assure that involuntarily unemployed workers do not have to resort to welfare in order to survive. The court below held, therefore, that the California procedure was not "reasonably calculated to insure the payment of unemployment compensation when due" as required by 42 U.S.C. 503(a)(1).

II

Upon the filing of a claim for unemployment compensation in California, a thorough factual investigation is con-

ducted in which all interested parties are given a full opportunity to be heard. A written decision is then rendered concerning the claimant's eligibility for unemployment benefits. The court below found that this determination is "the critical point in the California procedure." If found eligible, the claimant begins receiving weekly benefits. Upon the filing of an employer's appeal, however, his benefits are summarily cut off regardless of the merits of his case. He is afforded no opportunity to be heard before these benefits cease to flow.

The deprivation of unemployment benefits causes *eligible* recipients irreparable economic injury. Although unemployment funds provide greater security and dignity, they were designed by Congress to serve much the same purpose for involuntarily unemployed workers as public assistance serves for the blind, disabled, young, and aged. Both provide only subsistence benefits. Although financed under insurance principles, benefits schedules are based on need. Average need rather than individual need is utilized so that workers, who become unemployed through no fault of their own, are not compelled to undergo a humiliating "means" test. Without unemployment benefits, an *eligible* recipient may have nowhere to turn for support. By definition, he is involuntarily unemployed and hence, unable to find work. Moreover, since low income workers are the most frequent victims of involuntary unemployment, it is highly unlikely that an unemployment recipient will have sufficient savings to withstand the incipent stages of unemployment. Welfare often is not a viable alternative: in order to qualify for welfare, an individual must fit into one of several categories; eligible unemployed workers, especially those who are single and/or male, usually are not able to qualify. Furthermore, Congress clearly intended unemployment

compensation to provide security to unemployed workers without relegating them to public assistance.

An *ex parte* suspension of benefits from *eligible* employees pending an employer's appeal is an inherently arbitrary procedure. Benefits are cut off not by a Departmental redetermination but by the action of an adverse third party. No consideration is given to the merits of a recipient's case. Sixty-four percent of the appeals filed by employers are decided in favor of their former employees. An opportunity to be heard prior to the suspension of benefits would have enabled all of these employees to receive their benefits when they were most desperately needed.

No extraordinary or special situation justifies an *ex parte* suspension of unemployment benefits. Potential losses to the Unemployment Fund as a result of overpayments pending appeal are *de minimis*. Where overpayments do occur, the State has ample recoupment powers.

Nor are the interests of the State's employers adversely affected by the payment of benefits to *eligible* employees pending an employer's appeal. If at any appellate level, an employer succeeds in reversing an eligibility determination in favor of his former employee, he bears no responsibility for any payments that may have been made in the interim.

Unemployment benefits often provide desperately needed funds to involuntarily unemployed workers. An opportunity to be heard prior to the termination of benefits has been held constitutionally required for welfare recipients. Due process requires the same procedural safeguards for the "working poor."

ARGUMENT

I. The Procedures Authorized by Section 1335 of the California Unemployment Insurance Code Violate the Social Security Act by Denying Unemployment Benefits to Eligible Workers When Due.

A. CONGRESS INTENDED THAT UNEMPLOYMENT BENEFITS BE DUE DURING THE INITIAL STAGES OF UNEMPLOYMENT.

The Social Security Act of 1935, as amended, 42 U.S.C. 501-503, 1101 et. seq., and the Federal Unemployment Tax Act, as amended, 26 U.S.C. 3301-3309 set forth substantial tax and fiscal benefits for states that participate in the federal unemployment compensation program.[1] States that receive these benefits must, under the principle of "cooperative federalism," *King v. Smith,* 392 U.S. 309, 316 (1968), administer their unemployment compensation system in conformity with basic federal standards found in 42 U.S.C. 501-503, 1101 et. seq. and 26 U.S.C. 3301-3309. As this Court pointed out in upholding the constitutionality of the unemployment compensation scheme in *Steward Machine Co. v. Davis,* 301 U.S. 548, 594 (1937): "What they [the States] may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental." *Cf. Oklahoma v. Civil Service Commission,* 330 U.S. 127, 143 (1947).

Section 503(a)(1) of the Social Security Act provides in part:

> (a) The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment statutes] to any State unless he

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1. These benefits are indeed substantial. In 1968, for example, California's participation in the federal unemployment compensation program entitled it to receive $90,085,000 from the federal government for reimbursement of its administrative costs. *U.S. Statistical Abstract,* Table 571, 383 (1970). And, in 1963, such participation entitled its employers to credit $320,544,000 against the federal tax on employers. Note, 73 *Yale L.J.* 357, 358, n. 8 (1963).

finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . . .

The procedures authorized by Section 1335 of the California Unemployment Insurance Code are not "reasonably calculated to insure full payment of unemployment compensation when due." They undermine the fundamental purposes of the unemployment sections of the Social Security Act and render its goals less attainable.

The phrase "when due" is nowhere authoritatively defined. However, an examination of the reasons for unemployment insurance, as reflected in the legislative history of the Act and in commentary upon it, reveals that "when due" must mean during the initial stages of unemployment—the period in which it is clearly possible: (1) to maximize the opportunity for the unemployed to seek and find substantially equivalent employment with minimum privation and discomfort and without having to resort to public assistance; and (2) to prevent losses of purchasing power by the unemployed which could be irreparably damaging to the economy. Thus, if state procedures are to be considered "reasonably calculated to provide full payment of unemployment compensation when due," they must assure that payment of unemployment benefits to *eligible* workers begins during the initial stages of their unemployment.[2]

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2. Under the California scheme, a formal determination of eligibility based on a thorough factual investigation in which all interested parties are offered an opportunity to be heard is made in the third week following an unemployment insurance claim. *Infra* at 27-32. (A. 136, 128-129). Claimants found *eligible* and

To minimize the hardships unemployment visits upon unemployed workers and to avert the kind of catastrophic depression which occasioned the Social Security Act are the principal goals of our unemployment insurance system. "For the great bulk of industrial workers, unemployment will mean security during the period following unemployment when they are seeking another job, or waiting for a return to their old positions." *S. Rep.* No. 628, 74th Cong., 1st Sess. 12 (1935) [hereinafter *"S. Rep."*]. Unemployment compensation is intended to "maintain purchasing power at times when most needed, and [to] encourage the regularization of employment." *S. Rep.* at 16.

The Social Security Act was passed to "enable most workers who lose their jobs to tide themselves over, until they get back to their old work or find other employment without having to resort to relief . . . ." *H. R. Rep.* No. 615, 74th Cong., 1st Sess., 7 (1935) [herinafter *"H. R. Rep."*]. As its draftsmen indicated, it was designed to "carry workers over most, if not all, periods of unemployment in normal times, without resort to any other form of assistance." *Report to the President, Committee on Economic Security, Hearings on S.* 1130, *Senate Committee on Finance*, 74th Cong., 1st Sess. 1321-22 (1935) [hereinafter *"S. Hearings"*].

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thereby entitled to benefits during the initial stages of their unemployment must be carefully distinguished from those initially found *ineligible*, but who, sometime later, win appeals from that decision thereupon receiving benefits. Since the State has no way of learning that *these* claimants are eligible until they win their appeals, it can hardly be expected to pay them benefits during the pre-appeal period, even though the appellate hearing and subsequent commencement of benefits may take place after the "initial stages of unemployment." Thus, a State procedure that denies benefits pending appeal to claimants found ineligible while assuring payment to those determined eligible can still be considered "reasonably calculated to insure the full payment of unemployment compensation when due," so long as it affords ineligible claimants an opportunity for a timely appeal.

Thoroughly familiar with the plight of workers "thrown out of work suddenly,"[3] the 1935 Congress recognized the pressing need for "security during the period following unemployment." *S. Rep.* at 12. Welfare, however, was believed to be a particularly inappropriate means of sustaining workers during temporary periods of unemployment. As brought out on the House Floor by the Chairman of the Committee on Ways and Means:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. *Remarks of Representative Doughton,* 79 *Cong. Rec.* 5468 (1935).[4]

Moreover, serious doubts were raised about the ability of welfare to provide the relief sought: In a period of economic downturn, a system such as welfare, dependent for financing upon general tax revenues which themselves fluctuate with the state of the economy, might well be inadequate to the task of providing large numbers of unemployed workers with sustenance. Private charity also had proven itself unable to provide the fiscal organization and resources necessary to meet the exigencies of mass unemployment. See *Steward Machine Co. v. Davis,* 301 U.S. 548, 586-87 (1937); Note, 73 *Yale L. J.* 357, 359 (1963).

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3. *Statement of Harry L. Hopkins, Hearings on H. R.* 4120, *House of Representatives, Committee on Ways and Means,* 74th Cong., 1st Sess. 214 (1935) [hereinafter "*H. R. Hearings*"].

4. *See also, Douglas, Standards of Unemployment Insurance* 20 (1933).

Unemployment insurance, therefore, was enacted as an alternative to welfare, private charity, and relief. To avoid stigma, it was considered "a contractural right not dependent on any means test." *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22.[5] Furthermore, the availability of benefits in periods of economic crisis was assured by accumulating funds in periods of economic prosperity. See *H. R. Rep.* at 7.

In order for unemployment benefits "to replace [relief] in large part," *H. R. Rep.* at 7, in assuring workers "security during the period following unemployment," *S. Rep.* at 12, benefit payments clearly must begin in the initial stages of unemployment.[6] Unemployment benefits serve much the same purpose for workers as public assistance serves for welfare recipients. They provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend." *Statement of Frances Perkins, S. Hearings* at 119. Like welfare, unemployment benefits are "sustaining funds," *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967), "maintain[ing] the normal beneficiary at the subsistence level. . . ." Risenfeld, *The Place of Unemployment Insurance Within the Patterns and Policies of Protection Against Wage Loss*, 8 *Vand. L. Rev.* 218, 240 (1955). As an alternative source of subsistence funds, unemployment insurance was designed to "very materially reduce the cost of relief in future years." *S. Rep.* at 12. However, any substantial delay in commencng benefit pay-

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5. *See also, Statement of Edwin E. Witte, Executive Director, Committee on Economic Security, S. Hearings* at 216 (1935).

6. Citing from the Report of the President's Committee on Economic Security, two commentators stated that unemployment insurance was intended "as a 'first line of defense' *at the earliest possible date* to increase the security of all who are unemployed." Larson and Murray, *The Development of Unemployment Insurance in the United States*, 8 *Vand. L. Rev.* 181, 186 (1955) (emphasis added).

ments increases the number of unemployed workers who are forced to turn to relief, thereby undermining the Congressional purpose in establishing a separate insurance scheme for the labor force.

Unemployment insurance was also designed to financially assist unemployed workers in their efforts to find new employment.[7] President Roosevelt urged that "unemployment compensation should be set up under conditions which tend towards the regularization of employment." *S. Rep.* at 14. In explaining to the House Ways and Means Committee the reason why the draftsmen of the Social Security Act chose to pay unemployment benefits rather than directly provide work, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash. *Statement of Harry L. Hopkins, Federal Emergency Relief Administrator, H. R. Hearings* at 214.

If labor is able to flow from pockets of unemployment to areas where jobs are available, employment becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. But the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are not available until months elapse from the time he initially becomes un-

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7. Only those unemployed workers who are able and available for work are eligible for unemployment benefits. *Calif. Unemp. Ins. Code* §§ 1253, 1257-59.

employed. The funds which might have been used to increase labor mobility may instead have to be spent on basic necessities. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Thus, the opportunity to find employment diminishes to the extent that payments are delayed. As a result, delayed payments often increase the time necessary to find employment, and necessitate greater withdrawal from the State's Unemployment Insurance Fund than if payments were made during the initial stages of employment.[8]

Both the national economy and the unemployed worker benefit when purchasing power is maintained during periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." *H. R. Rep.* at 7. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 596, n. 13 (1937). Unemployed workers, during the period in which they receive no compensation, are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms, which in turn causes further unemployment, and eventually, economic depression. Maintenance of purchasing power, on the other hand, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Society Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the

8. California justifies its present scheme of delaying payments to eligible recipients in the event of an employer appeal as one means of preventing depletion of its Unemployment Fund. Ironically, such delays may instead *increase* the burden on the Fund by lengthening the period of unemployment and hence, the period of eligibility for benefits.

stabilization of industry. . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity. *S. Hearings* at 2.

Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security, which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance, come to a recognition that the small merchants of a locality, and those who provided them with their stock, had derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect upon employment in other lines than in that first depressed. *S. Hearings* at 111.

But, for such benefits to be fully realized from the maintenance of purchasing power, it is necessary that unemployment benefits begin in the critical initial stages of unemployment—not in lump sum form, long after unemployment has occurred. Payments must commence "early in the downturn, immediately after unemployment makes its appearance." Clague, *The Economics of Unemployment Compensation*, 55 *Yale L.J.* 53, 69 (1945). The funds are "specially earmarked for the use of the unemployed at the very times when it is best for business that they should be so used." *Statement of Senator Robert F. Wagner, S. Hearings* at 3. Early payments enable workers and their families:

> to preserve existing assets, such as homes, furniture, and automobiles, thus avoiding the forced liquidation of assets which aggravates the downturn in business. They encourage more confident spending of other resources, thus helping to avoid a 'freezing' of purchas-

> ing power on the part of millions of workers when they are faced with unemployment. Clague, *supra* at 69.

Whereas lump sum payments[9] may be spent erratically, a steady weekly income, assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries, such as agriculture, food, and clothing." *Id.*

Early payments, "help maintain spending habits at a time when business may be heading downhill." *Id.* at 70. As Secretary Perkins testified before the House Committee on Ways and Means:

> [T]he importance of providing purchasing power for these people, even though temporary, is of very great significance *in the beginning of a depression.* I really believe that putting purchasing power in the form of unemployment insurance benefits in the hands of the people *at the moment when the depression begins and when the first groups begin to be laid off* is bound to have a beneficial effect. Not only will you stabilize their purchases, but through stabilization of their purchases you will keep other industries from going downward, and immediately you spread work by that very device. By keeping alive certain industries through the expenditure of small but certain unemployment insurance benefits, a stop will be put to this downward spiral of employment and the length of depressions . . . will be reduced. *H.R. Hearings* at 182 (emphasis added).

Congress had three purposes in mind, then, when it enacted its unemployment scheme: providing sustenance and

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9. In 1969, 5,325 *eligible* California unemployment recipients received their unemployment benefits retroactively, *in a lump sum*, due to the suspension of benefits pending unsuccessful employer appeals of eligibility determinations in their favor. J. S. App. C at 14.

security to unemployed workers without relegating them to public assistance, helping unemployed workers find new jobs, and maintaining purchasing power at the onset of any economic downturn. Clearly, Congress must have intended that payments be "due" to eligible workers at a time in their unemployment cycle when these goals would be facilitated rather than frustrated. To accomplish this end, payments must not only commence when a worker is still unemployed; they must also begin during the initial stages of unemployment.

B. BECAUSE CALIFORNIA'S PROCEDURES ASSURE THE DENIAL OF UNEMPLOYMENT COMPENSATION TO MANY ELIGIBLE RECIPIENTS DURING THE INITIAL STAGES OF UNEMPLOYMENT, THEY ARE NOT REASONABLY CALCULATED TO INSURE FULL PAYMENT OF UNEMPLOYMENT BENEFITS WHEN DUE.

To insure payment during the initial stages of eligibility, Congress provided that state unemployment procedures must be "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. 503(a)(1). As the district court found, the procedures authorized by Section 1335 of the California Unemployment Insurance Code for disbursing unemployment benefits are not so calculated. (A. 139). Whenever a California employer appeals a formal Departmental determination[10] that one of his former employees is eligible for unemploy-

10. As the district court points out (A. 135-137), the eligibility determination is based upon a thorough factual investigation in which all parties have an opportunity to be heard. *See Cal. Unemp. Ins. Code*, §§ 1327, 1328; Local Office Manual §§ 1400.3, 1400.5, 1404.2, 1404.4 (A. 117-121). In 1969, 136,284 claimants who had earned sufficient wages to file a valid unemployment claim were formally found ineligible *at this juncture* because the evidence revealed they had left their last employment under disqualifying conditions. J. S. App. C at 14. An investigation which eliminates such a large percentage of otherwise eligible claimants, as this one does, can hardly be considered perfunctory.

ment benefits, all benefits to that employee are immediately suspended until the appeal is heard and a decision is rendered. *Cal. Unemp. Ins. Code* § 1335. If, as in most cases, the determination is affirmed, benefits are paid retroactively in a lump sum many weeks later.

An employer has an economic incentive to appeal an eligibility determination in his former employee's favor,[11] and benefits are suspended whenever and for whatever reason he files an appeal. *Calif. Unemp. Ins. Code* § 1335.[12] In 1969, 8,315 such appeals were filed by employers. (J.S. App. C at 14). In 64 per cent of the cases, the referee agreed that the employee was entitled to unemployment benefits. Thus, the California procedure resulted in wrongfully denying subsistence benefits for extended periods of time to 5,325 workers who had consistently been found eligible for benefits.

The median length of time between the filing of an appeal and the mailing of the decision is 49 days. (A. 106, 139). That is, 50 per cent of the thus-far eligible unem-

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11. A desire to protect his reserve account is the employer's economic incentive: the amount of money he is required to pay into the Unemployment Fund is based on the number of his former employees who qualify for unemployment benefits. Indeed, he has no reason not to appeal. An employer does not, however, have a direct economic interest in having benefit payments to his former employees suspended pending his appeal; should the employer be successful on appeal, his "reserve account" is immediately credited with all monies that have been paid to his former employee. He has no responsibility for recoupment. *Calif. Unemp. Ins. Code* §§ 1335, 1380.

12. Although good cause must be shown for a late appeal, *Cal. Unemp. Ins. Code* § 1328, benefits are cut off immediately upon such an appeal, with the question of good cause left for the appellate hearing. At the hearing, the first issue is whether the employer had good cause for his lateness. Thus, even when there is no excuse for tardiness and an employer's appeal is not heard on the merits, *eligible* employees are denied necessary benefits for many weeks and often months.

ployed workers whose benefits have been wrongfully withheld must subsist without them for more than seven weeks.[13]

Since the median length of time an unemployed worker receives unemployment benefits is also 7 weeks (A. 122), the California procedure assures that a large number of workers receive their benefits retroactively in a lump sum at a time when they would no longer qualify for current unemployment benefits. Thus, in the event that his employer appeals, an *eligible* worker may receive no weekly benefits during the months when he is unemployed and in desperate need of income, only to receive a lump sum payment some time in the future when he is already back at work.

Clearly then, the California scheme does not result in making payments during the "limited period" between jobs which Congress intended unemployment benefits to cover. *H.R.Rep.* at 7. *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22. As a California legislative study, which successfully recommended the reduction of the waiting period for unemployment benefits to one week, points out: "It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter." *Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature*, 62 (1945). *See also*, Clague, *The Economics of Unemployment Compensation*, 55 *Yale L. J.* 53, 69 (1945).

By providing delayed lump sum payments so late in the unemployment cycle, the procedures authorized by Section 1335 undermine rather than promote Congress' three pur-

13. In 1969, 13% of those workers who benefits were suspended pursuant to Section 1335 were required to survive without them for over 10 weeks. *U.S. Department of Labor, Manpower Administration, Unemployment Insurance Statistics*, Table 17, (March 1970).

poses in passing the federal Unemployment Act. Purchasing power at the outset of an economic downturn can be maintained only with weekly payments for necessities. Unemployed workers cannot hope to find new jobs without money for transportation and other search-related expenses. Finally, without funds for sustenance and security, unemployed workers may be forced to seek public assistance. As the district court points out:

> Defendants [California] urge that public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. This was certainly the primary reason for 42 U.S.C. § 503(a)(1) and the requirement that State programs assure full payment of benefits "when due". (A. 139, 63, 65).[14]

The eligibility determination in California is made on the basis of a thorough factual investigation with all relevant parties having an opportunity to be heard. (A. 136). *Infra* at 27-32. Since it is reached in the initial stages of unemployment, prompt payment upon its completion fulfills the purposes of the Unemployment Act. As the district court found: "There seems little question that this is the critical period in the California procedure. . . . It is clear that in California payments become "due," and are paid, upon the favorable decision of the interviewer."

"When due" in the California context, therefore, is promptly after the eligibility determination. By assuring that a large class of *eligible* recipients are denied benefits until long after that determination, California's disburse-

14. Both of the individual appellees in this case were forced to resort to welfare while the appeals filed by their former employers were being decided. Each has dependent children. If an unemployed worker has no dependent children and is not blind, disabled, or of retirement age, he is ineligible for categorical assistance and must look elsewhere for sustenance.

ment procedures are not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. 503(a)(1).

The State asserts that the procedures authorized by Section 1335 cannot be inconsistent with the federal Social Security Act because they are based upon model state statutes circulated by the President's Committee on Economic Security—the original draftsmen of the Act—while Congress was debating it.[15] However, these model statutes were never recommended by Congress, nor are they out of harmony with the notion that by requiring unemployment benefits to be paid "when due," Congress meant "during the initial stages of unemployment."

Congress never drafted the model bills or approved them as law. Indeed, there is no evidence that Congress ever considered them in its deliberations on the complex and lengthy Social Security Act:[16] No substantive testimony on the model acts was elicited at the Committee hearings, nor are they mentioned in the Committee reports. Thus, it can hardly be said that the bills were approved, recommended, or circulated by Congress.[17]

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15. Drafts of possible state statutes were sent to the Senate Finance Committee which was conducting hearings on the Social Security Act and were inserted into the record. *S. Hearings* at 602, 623.

16. In addition to unemployment insurance, the Social Security Act created new programs for federal old-age assistance, state old-age assistance, aid to dependent children, aid for maternal and child welfare, aid to the blind and public health.

17. Indeed, not only were these model state acts not circulated, approved, or recommended by Congress, they were never even considered by the members of the President's Committee on Economic Security, the body charged by the President with drafting the federal statute. As Edwin E. Witte, Executive Director of the Committee revealed: "None of this material [the model acts] was ever submitted to the members of the committee, but was sent out on my own responsibility . . ." *E. Witte, The Development of the Social Security Act* 125-26, n. 78 (1963).

Moreover, nothing in the model acts sanctions a long delay in benefit payments to eligible workers. While they do provide for a short stay of benefits to allow an employer an opportunity to be heard,[18] the model acts assure payment during the initial stages of unemployment by providing that "the claim thus disputed shall be *promptly* decided." *S. Hearings* at 603, 623 (emphasis added). Surely the California procedure, under which a significant number of eligible claimants receive their benefits long after they first become unemployed and, in many instances, after they are reemployed and no longer qualified for benefits, cannot be considered to decide claims promptly. The model bills appear to assure with their requirement of promptness that benefits are paid "when due." Because the California scheme allows long-delayed payments, it is inconsistent with both the model acts and the federal statute.

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18. Under California's unemployment procedures, as the district court pointed out, the employer has had a full opportunity to be heard *before* the eligibility determination. (A. 136) *Cal. Unemp. Ins. Code* §§ 1327, 1328; Local Office Manual § 1400.25, 1400.3, 1400.5, 1404.2, 1404.4 (A. 117-123). *Infra* at 27-32. No stay of benefits, therefore, is necessary to provide him that opportunity. Under the Model Acts, however, the employer is apparently not contacted until the Department has determined that the claimant has a claim that is valid on its face. Then a short stay is provided so that the employer can be heard. A similar procedure is found in the District of Columbia. See *D.C. Code* § 46-311(b). Under this procedure, appeals are decided much more quickly in the District of Columbia than in California. Over 51.6 percent of all benefit appeals in the District in 1969 were decided in less than 30 days; only 24.1 percent were decided within a comparable period in California. *U.S. Department of Labor, Manpower Administration, Unemployment Insurance Statistics*, Table 17, (March, 1970). *See also, District Unemployment Compensation Board v. Hahn*, 399 F. 2d 987 (D.C. Cir., 1968). Neither the model acts nor Section 46-311(b) of the District of Columbia Code contemplate a lengthy stay pending appeal. Any substantial delay in paying benefits to *eligible* recipients would constitute a violation of those statutes.

C. THE DENIAL TO ELIGIBLE RECIPIENTS OF UNEMPLOYMENT BENEFITS WHEN DUE IS SUBJECT TO JUDICIAL REVIEW.

Just last term in *Rosado v. Wyman*, 397 U.S. 397 (1970), a case alleging state noncompliance with provisions in the welfare section of the Social Security Act, this Court noted:

> Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs, 397 U.S. at 406,

and held:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the states in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, *Association of Data Processing v. Camp*, 397 U.S. 150; *Barlow v. Callins*, 397 U.S. 159.
> 397 U.S. at 420.

See also King v. Smith, 392 U.S. 309 (1968); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968); *Case v. Borak*, 377 U.S. 426, 432-33 (1964). *Cf. Office of Communications of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (D. C. Cir. 1966).

Similarly, the California procedures which were found by the district court to be in violation of the unemployment section of the Social Security Act are subject to judicial review. Like HEW, the Labor Department has no procedure whereby an unemployment claimant "may trigger

and participate" in a Departmental review of a state unemployment program. Unemployment compensation was intended to provide its beneficiaries—eligible unemployed workers—with a well-earned "contractural right," *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22. This action is the only way in which those beneficiaries can enforce their right to unemployment benefits "when due" 42 U.S.C. 503(a)(1). As this Court concluded in *Rosado:*

> [W]e find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field. . . . It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare [unemployment] field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use. 397 U.S. at 422-23.

II. Due Process Requires an Opportunity to Be Heard Before the Suspension of Unemployment Benefits.

A. PROCEDURAL DUE PROCESS EXTENDS TO UNEMPLOYMENT RECIPIENTS.

Last term in *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970), this Court reiterated its holding in *Sherbert v. Verner,* 374 U.S. 398 (1963) that: "Relevant constitutional restraints apply . . . to disqualification for unemployment compensation."[19] The framework for considering procedural due process which this Court set forth in *Goldberg* applies equally well to the suspension of unemployment benefits:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to

19. "The interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Sherbert v. Verner,* 374 U.S. 398, 405 (1968).

which he may be "condemned to suffer grievous loss," . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. at 262-63. (citation ommitted).

B. SECTION 1335 CUTS OFF UNEMPLOYMENT COMPENSATION FROM RECIPIENTS WHO HAVE ACQUIRED A RIGHT TO BENEFITS AFTER A THOROUGH FACTUAL INVESTIGATION ON THE MERITS.

The unemployed workers before this Court have all been found eligible by the State for unemployment compensation and have begun receiving benefits. No Departmental redetermination precedes the suspension of their benefits. No matter how strong their case, their benefits are routinely cut off upon an employer's appeal of the Department's decision to a State referee. This occurs despite the fact that, as the court below found, the eligibility determination is the product of a thorough factual investigation in which all interested parties are afforded an opportunity to be heard.

To commence the determination process, the prospective claimant files three forms (1101, 1426, and 3893) in order to notify the Department of the basis of the claim. These forms include information concerning the claimant's last employer, the reason for his no longer working and his work experience (A. 135). The claimant's reasons for no longer working are entered on DE 1101, and copies of this form are mailed to the claimant's previous employer for verification (A. 136). Pursuant to Section 1327 of the California Unemployment Insurance Code, the employer is then required to submit, within 10 days, "any facts then known which may affect the claimant's eligibility for benefits." (A. 136).

In the meantime, the claimant is informed that he must serve a waiting period consisting of the first week of un-

employment, during which he receives no payments; he is instructed to return during the third week of his claim for a second, more complete interview to determine his eligibility. This time increment allows the Department to verify the earnings reported and receive information from the employer concerning the claimant's reasons for leaving work. The employer may respond in writing, by phone, or, if he so elects, in person in those cases he wishes to contest, accompanied by any witnesses he desires.[20] Professional employer representatives also are available to him.

Upon the claimant's return, the eligibility interviewer must conduct an Eligibility Benefit Rights Interview, at which time he speaks personally with the claimant. If the employer has raised an issue concerning eligibility, the claimant may be required to submit detailed information pertaining to his separation from employment. (A. 136). Departmental regulations (L.O.M. 1400.3) impose a duty on the eligibility interviewer "to seek *from any source* the facts required to make a prompt and proper determination of eligibility." (A. 117) (emphasis added). If employer statements do not resolve the relevant issues of fact, "the employer must be given an opportunity to provide additional information." (A. 136). All interested individuals must be allowed to "confirm, contradict, refute, or explain any [relevant] evidence." (A. 136). The interviewer is further required to contact "all logical sources of information" and all parties who are necessary to ascertain the circumstances surrounding the claimant's separation from employment. This includes "telephone contact." L.O.M. 1404.4 (A. 122). If additional information is required, the

20. It is no more difficult for an employer to appear personally at the eligibility determination than at the appellate hearing. In either case, he need only appear in those cases he wishes to contest.

regulations specify that the eligibility interviewer may postpone his decision for 10 additional days. "The eligibility interviewer must then consider the evidence presented by all sides" (A. 136), and make a written determination of eligibility, recording the facts obtained and the reasons for reaching his conclusion. *Calif. Unemp. Ins. Code* § 1328; L.O.M. 1404.4 (22) (A. 123).

When the determination is favorable to the claimant, he is given credit for serving the waiting period and immediately paid for the second week. Payments are made weekly thereafter, unless the employer appeals the Department's decision to a State referee, in which case payments are thenceforth suspended. *Calif. Unemp. Ins. Code* § 1335. Although the claimant receives no weekly benefits pending the appeal, a median period of seven weeks (A. 106, 134, 137, 139), he is nonetheless required to report for suitable work each week in order to maintain his eligibility status and thus collect weekly benefits, in the event that he should prevail on appeal. *Calif. Unemp. Ins. Code* § 1253. If the decision is affirmed, his benefits are paid retroactively in a lump sum.

It is ludicrous to assert that a recipient who has been ruled eligible, begun receiving benefits and had them suspended due to an employer's appeal is seeking "payment *before* his eligibility has been established." (Appellants' Brief at 19). As the district court found:

> There seems little question that [the eligibility determination] is the critical point in the California procedure. The Department itself proclaims that "[t]he determination is the point at which any issue affecting the claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible. L.O.M. § 1400.1" [A. 116]. Payments begin upon this

> decision. . . . All parties have been heard, evidence has been collected and an adjudication made. (A. 137).[21]

The eligibility determination is, in practice, the principal juncture for weeding out ineligible claimants; of the 139,274 claimants ruled ineligible in 1969 for leaving their last employment under disqualifying conditions, only 2,990 (1%) were found ineligible by a State referee upon an employer's appeal. (J.S. App. C at 14).[22] The remainder were found ineligible at the initial eligibility determination.

Equally without reason is the contention that the employee has an "overwhelming advantage" at the eligibility determination. (Appellants' Brief at 16). Of the 667,993 formal eligibility determinations made by the Department in 1968, 266,066 claimants were ruled *ineligible* for unemployment insurance. (A. 105). As a former Department interviewer and social insurance analyst points out:

> The most common reasons for resentment [by claimants] are that the interviewer doesn't listen to the claimant's side of the story, that the interviewer is too ready to accept the employer's version as given in writing or over the telephone, and that the claimant is expected to sign a record of the interview written by the interviewer. I think all three charges have merit. At desk interviews with a claimant, interviewers tend to develop a prejudice on the basis of information in

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21. A recent California legislative study described the eligibility determination in the following manner:

> Since the former employer is notified of the reason given by the claimant for his being unemployed, there is an opportunity for the department to ascertain factual circumstances relative to any assertion of the claimant. If the former employer does not agree, he provides his version as to why the employment relationship was terminated. At this point, the department examines the evidence and makes a "determination"—a decision as to the reason why the claimant is no longer employed. If such reason is disqualifying, no benefits are paid during the ensuing period of employment. *Report to the California Legislature, Joint Interim Legislative Unemployment Insurance Committee* 20 (1969).

22. In 64 percent of the cases that were appealed by employers in 1969, Departmental eligibility determinations were upheld. J.S. App. C at 14.

> the documents before them and rarely have the time or the disposition to hear the claimant's version which is often rambling and dedicated to irrelevancies . . . . Documentary evidence appears to have a mesmeric effect upon interviewers. Harris, "Claimant Views of Unemployment Administration in California" *Unemployment Insurance Review, U. S. Dept. of Labor* 2, 4 (July, 1967).

Nor is it "misleading to characterize" an appeal filed by an employer under Section 1328 of the Unemployment Code as an "appeal." (Appellants' Brief at 11). The California statute itself defines it as an "appeal," *Calif. Unemp. Ins. Code* § 1328, and it squarely fits appellants' definition of an appeal:

> Generally, an appeal implies that at an earlier time both parties to a controversy have had a full opportunity to present their respective case and one party, displeased with the result, seeks to have a higher tribunal redress the purported errors of the lower court. (Appellants' Brief at 12).

As the district court found:

> The eligibility interviewer must, then, consider the evidence presented by all sides and make a "determination" or "determination ruling" as to eligibility . . . . At that point, all parties have been heard, evidence has been collected, and an adjudication made. (A. 136, 137).

The appeal in California, therefore, is clearly not "the employer's first chance to present his case" (Appellants' Brief at 12).[23] Appellate jurisdiction lies not in the Depart-

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23. This is not necessarily the procedure followed in other states. In those jurisdictions that adopted the procedures outlined in the Model Acts, the employer is not contacted until after the Department has initially determined that a claim is valid on its face. A short stay of benefits is then provided so that the employer can be heard. *See e.g., D.C. Code,* § 46-311(b). In 1969, in the District of Columbia, 58 percent of the initial determinations appealed by employers were reversed; during the same period in California, employers prevailed in only 36% of their appeals. *U.S. Department of Labor, Bureau of Manpower Administration, Unemployment Insurance Statistics,* Table 18 (March, 1970).

ment, but rather the California Unemployment Insurance Appeals Board, an independent appellate body. *Calif. Unemp. Ins. Code* § 401. Appeals are heard by State referees who are responsible only to the Appeals Board. *Calif. Unemp. Ins. Code* § 404.

In California, therefore, an initial determination of a claimant's eligibility confers a right to benefits upon that claimant. Under Section 1335, they may then be suspended no matter how strong the merits of his case. The routine suspension of benefits, pending an employer's appeal, arbitrarily deprives him of due process of law.

C. AN OPPORTUNITY TO BE HEARD BEFORE THE SUSPENSION OF BENEFITS IS CRITICAL TO THE VITAL INTERESTS OF UNEMPLOYMENT RECIPIENTS.

1. An opportunity to be heard has traditionally been required before governmental action becomes effective.

"A fundamental requirement of due process is the 'opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has long recognized that the opportunity to be heard required by due process may not be meaningful unless afforded prior to the taking of property:[24] As noted in *Southern Railway Co. v. Virginia*, 290 U.S. 190, 196 (1933):

> The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative office the appellant is entitled to a fair hearing upon the fundamental facts.

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24. This Court recognized in *Goldberg* that "much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property." *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 8 (1970). Governmental interference with these interests likewise requires a meaningful opportunity to be heard. *See, e.g. Willner v. Comm. on Character and Fitness*, 373 U.S. 96 (1963); *Greene v. McElroy*, 360 U.S. 474 (1959). *See also,*

See also, Opp. Cotton Mills v. Administration, 312 U.S. 126, 152-153 (1941); *U.S. v. Illinois Central Railway Co.,* 291 U.S. 457, 463 (1934); *Londoner v. Denver,* 210 U.S. 373 (1910).

Twice within the last two terms, this Court has recognized that in situations involving serious personal need, only an opportunity to be heard *before* the taking of property affords meaningful process. In *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 342 (1969), the Court found unconstitutional a prejudgment garnishment procedure: "It needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process." (citation omitted). The notion that a later hearing on the merits meets constitutional requirements was explicitly rejected: "But in the interim the wage earner is deprived of his enjoyment of earned wages." 395 U.S. at 339.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court held that procedural due process requires an opportunity to be heard *before* the termination of public assistance benefits. Again, post-termination evidentiary hearings were found constitutionally deficient.

2. The suspension of unemployment benefits from eligible workers causes irreparable economic injury.

The unemployment recipient before the Court stands in an economic position similar to that of the garnisheed

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Escalera v. New York City Housing Authority, 425 F. 2d 853 (2nd Cir., 1970) (eviction from public housing); *Dixon v. Alabama State Board of Education,* 294 F. 2d 150 (5th Cir., 1961), *cert. denied,* 368 U.S. 930 (1961) (suspension from public education); *Doyle v. Finch,* No. SA 69-CA 321, ... F. Supp. ..... (W.D. Texas, 1970) (disability benefits); *Contra, Messer v. Finch,* 314 F. Supp. 511 (E.D. Ky. 1970.) *See generally,* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 *Harv. L. Rev.* 1439 (1968). Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 *Yale L. J.* 1245, 1255 (1965); Reich, *The New Property,* 73 *Yale L. J.* 733 (1964).

wage-earner in *Sniadach* and the welfare recipient in *Goldberg*. Although eligible for subsistence benefits, he has been deprived of their use without an opportunity to be heard during the period in which they are most critically needed. Vindication in a proceeding that occurs weeks, or often months later is hardly likely to make him whole.

Under the Wisconsin pre-judgment garnishment statute overruled in *Sniadach*, a "subsistence allowance" was exempted from attachment—50 percent of salary up to $25 for single individuals and $40 for those with dependents. *Sniadach, supra* at 338, n. 1. Yet the Court found that "a pre-judgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." *Id.* at 341-342.

The eligible unemployment recipient whose benefits are cut off pending his employer's appeal is even less fortunate. Having lost his "subsistence allowance," *i.e.*, the unemployment benefits themselves, he may be left totally destitute. And since he has been determined by the Department to be *eligible* for unemployment benefits, he is, by definition, *involuntarily* unemployed. *Calif. Unemp. Ins. Code*, §§ 1253, 1257-59. Weeks may pass before he is able to find work, especially in a period of wide-spread unemployment.[25]

This Court has long recognized the critical role played by unemployment benefits in the life of an involuntarily unemployed worker:

> Unemployment compensation will meet the breakdown which takes place in the family of the individual worker who is unemployed, the cumulative effect of unemployment upon his health and upon the health of his family. The effect of vagrancy is obvious, so

25. The California unemployment rate was 7% in December, 1970. *See, Press Release HRD* E-U242, January 11, 1971, California Department of Human Resources Development.

is the effect upon the taxpayer. *Steward Machine Co. v. Davis,* 301 U.S. 548, 558 (1937).

See also, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1936). Thirty years later in *Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1967), a unanimous Court pointed out that an unemployed worker "risk[s] financial ruin" when left without unemployment funds for a lengthy period of time. In the words of Mr. Justice Black:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severence of *sustaining funds.* 389 U.S. at 239. (emphasis added).

In the course of outlining the plight of qualified welfare recipients left without benefits in *Goldberg,* the Court specifically referred back to the above passage in *Nash* discussing the dilemma faced by unemployment recipients:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. *Cf. Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1967).
>
> 397 U.S. at 264.

Thus, in distinguishing the termination of welfare benefits from the great majority of other instances involving the suspension of governmental funds ("the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption" 397 U.S. at 264) on the basis of the "crucial factor" of need, the Court in *Goldberg* was well aware that similar need is present in the case of suspensions of unemployment benefits.

Although unemployment benefits provide greater security and dignity, they were designed to serve much the same purpose for involuntarily unemployed workers as public assistance serves for the blind, disabled, young and aged. *Supra* at 12-15. Each provides "substaining funds" *Nash,*

supra at 239, to a recipient "when otherwise he would have nothing to spend." *Statement of Frances Perkins, S. Hearings* at 119. Each had its inception in the 1935 Social Security Act. Just as unemployment benefits were enacted to sustain the involuntarily unemployed and their families, the AFDC program before the Court in *Goldberg* was intended to protect children without "employable" parents. The programs are complementary both in nature and design. *See King v. Smith,* 392 U.S. 309, 327-333 (1968).

A close examination of the unemployment compensation scheme reveals its "welfare" function. While financed under insurance principles, "the insurance technique is a means to the welfare end." Becker, "The Adequacy of Benefits in Unemployment Insurance," *In Aid of the Unemployed* 80 (1965). The insurance technique is employed because it assures administrative convenience to the State, gives dignity to the unemployed worker, and accumulates funds in prosperous times for use in periods of recession. Need is based upon class studies and "operates in terms of averages" *Id.* Thus a detailed inquiry into individual need in every case is not required. But the system is clearly designed to meet individual need. "If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established. . . ." *Id.* at 81.

A judgment as to average need is determinative of the amount of benefits an unemployed worker receives. Recognizing that low-income workers are highly unlikely to have funds set aside for sudden periods of unemployment, benefit formulae are weighted in their favor:

> A judgment as to need also partly explains the existence of a maximum benefit. . . . The higher paid worker receiv[es] a smaller proportion of his wages in bene-

> fits . . . [because] he is not in so great need as the lower-paid worker and is more able to help himself. *Id.*

Moreover, "a judgment as to need underlies the provision of uniform duration, minimum benefits, and—in twelve states—dependency allowances." *Id.*

Departmental statistics further reveal the desperate plight faced by *eligible* unemployment recipients whose benefits are wrongfully withheld. The median yearly earnings of California unemployment insurance claimants are $3,933. *Report No.* 416, No. 6, *Claimants Who Filed Valid New Claims October 1966—September 1967, California Department of Human Resources Development* 3 (April 1, 1970) [hereinafter "*Report No.* 416"].[26] The poverty level for a family of four has been officially recognized as $3,531 —a most conservative estimate. *Department of Commerce, Bureau of the Census, Current Population Reports, Series P-60 No.* 68 (1969).

Unemployment especially affects workers without liquid assets. A 1953 Department publication reveals:

> A large proportion of the claimants, however, have a subsequent period of compensated unemployment within a benefit year, so there is some reason to believe that many are attached to covered employment only marginally. *A Sourcebook on Unemployment Insurance In California, California Department of Unemployment* 69 (1953).

The same situation still prevails. Fifty percent of the men and thirty-six percent of the women who are found eligible for unemployment file more than one claim a year. *Report*

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26. Although the survey covered October, 1966 to September, 1967, it was not published until April 1, 1970 and is the latest report available. The figures are based on "base-period" earnings. The base-period is a consecutive twelve-month period. *See Calif. Unemp. Ins. Code* § 1276.

No. 416, at 3,23. Employees who experience more than one unemployment episode a year are unable to build up cash reserves for periods of sudden unemployment. Some 48 percent of all families earning $3,000-$6,000 per year have less than $200 in liquid assets. Katoma, "Private Pensions and Individual Savings," *Investigation for the U.S. Department of HEW, University of Michigan Survey Research Center* 63 (1965). *See also, U.S. Statistical Abstract, Table No.* 485 (1970).

For workers without liquid assets, unemployment benefits are critical to survival. A study based on over 5 million unemployment recipients points out that "the combination of all other types of nonwage income contributed *less* to the aggregate income of the unemployed than did unemployment insurance." Stein, "Special Labor Force Report: Work History, Attitudes of the Unemployed," 86 *Monthly Labor Review* 1405, 1411 (1963).

For those eligible workers whose unemployment benefits are suspended, basic necessities often have to be sacrificed. According to one survey, twenty-six percent of the households *receiving* unemployment benefits must resort to reductions in food expenditures, usually in the first weeks of unemployment. Klein, *Pennsylvania State University, Financial Adjustments to Unemployment, Occasional Paper 93, National Bureau of Economic Research* 35, 50 (1965). The percentage would be expected to be even higher among the recipients presently before the Court who, although found *eligible* for benefits, receive *no* funds for the lengthy period between the time their employer files an appeal and the time the decision is finally made. As in *Goldberg* then, "the termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Goldberg v. Kelly, supra* at 264.

Many unemployment recipients also find it necessary either to default on fixed obligations or to go into debt. "During the year in which unemployment occurred, more than one-fourth of the households borrowed money either from family funds or financial institutions" (Klein, at 3), usually in the first weeks of unemployment. *Id.* at 40. Again the percentage would be expected to be even greater for the *eligible* recipients before the Court who, under Section 1335, are left totally without benfiets.[27]

Moreover, welfare is often not a viable alternative for the eligible unemployment recipient whose benefits have been wrongfully suspended.[28] There are four categorical public assistance programs created by the Social Security Act and administered by the states: Old Age Assistance, Aid to the Disabled, Aid to the Blind, and Aid to Families with Dependent Children. *Cal. W & I Code*, §§ 11200, 12000, 12500 and 13500. Since a claimant would have to be blind, disabled or of retirement age to qualify for the first three categories, these can be disregarded almost entirely, as the claimant is by definition eligible for the labor market. *Calif. Unemp. Ins. Code* §§ 1253, 1257-59. In order to qualify for the fourth, the claimant must have minor children, which excludes all single wage earners or childless couples.[29] Furthermore, his family must have less than $600

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27. Mortgage foreclosures also present a significant problem to unemployed workers. *See Mortgage Foreclosure in Six Metropolitan Areas*, "The Relationship of Unemployment to Mortgage Foreclosures", 86 *Monthly Labor Review* 1421, 1422 (1963).

28. As the court below found, the "primary reason" states were required to pay benefits "when due" under 42 U.S.C. 503(a)(1) was to tide workers through temporary periods of unemployment *without having to resort to relief*. (A. 139) (emphasis added). *See H. R. Rep.* at 7; *supra* at 12-15.

29. In addition, in those states which do not have AFDC-Unemployed (AFDC-U) programs, 42 U.S.C. 606(b)(1), 607, unemployed workers with minor children and a spouse in the home are also not eligible for AFDC benefits.

in personal property.[30] Thus, even the recipient with a family who is eligible for welfare suffers irreparably: to receive benefits, he must divest himself of nearly all of his assets including, if it exceeds the welfare ceiling in value, the very car he needs to look for work.

Nor is general assistance ("county poor relief") a feasible alternative. In California, the counties are required by State law to provide for poor persons within their respective jurisdictions. *Cal. W & I Code* §§ 17000-01.[31] However, since general assistance is funded solely by local resources,[32] it is completely inadequate to provide even a bare subsistence level of benefits. The average payment to a family in California under the general assistance program in 1969 was $59.74 per month (less than $14.94 per week). *California Human Relations Agency, Public Welfare in California, Table* 29 (1969). The county averages varied from a high of $95.28 per month in San Francisco to $8.24 per month in Tulare County. Moreover, since counties have complete power to determine all conditions governing eligibility,[33]

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30. A welfare recipient is entitled to own a car worth up to $1500 if he uses it to seek work. *Cal. W & I Code* § 11255.

31. In many States, general assistance is not required but is totally a matter of county option.

32. Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 *U.C.L.A. L. Rev.* 787, 813 (1968).

The parochial nature of general assistance makes it a totally unreliable alternative to unemployment insurance:

> Persons ineligible under federally-aided programs may receive a limited or sporadic assistance in some parts of some States from State or locally financed general assistance programs. . . . [S]ome states provide no funds for general assistance; or . . . general assistance may be available in some parts of some States which have very low standards. *Advisory Council on Public Welfare, Having the Power, We Have the Duty* 25 (1966).

33. *County of Los Angeles v. Department of Social Welfare*, 41 Cal. 2d 455, 260 P.2d 41 (1955). *Advisory Council on Public Welfare, Having the Power, We Have the Duty* 25 (1966).

in some States able-bodied wage earners are specifically excluded from general assistance.

As one commentator notes:

> Since able-bodied men typically are omitted from coverage under categorical assistance, their needs must be met under general assistance, if at all. We know, however, that the unemployed or underemployed are ineligible for income maintenance in a number of jurisdictions. Hence, certain needy persons do not, under the present system, have access to public support. Rosenheim, *Vagrancy Concepts in Welfare Law,* 54 *Calif. L. Rev.* 511, 521 (1966).

Thus, an unemployed wage earner whose unemployment benefits have been suspended under Section 1335 is either excluded from most of the available welfare programs, or would suffer financial ruin if forced to rely on those open to him.[34] And, even if eligible, he would first be required to undergo a thorough eligibility investigation by the local welfare agency, which may not be completed for a number of weeks. In California:

> The determination of eligibility shall be completed . . . within not more than 30 calendar days. . . . [T]he specified time limit may be exceeded where completion of the determination of eligibility is delayed because of circumstances beyond the reasonable control of the agency. *State Dept. of Social Welfare, Public Social Services Manual, Reg.* 40-126.

As in *Goldberg* and in *Sniadach* then, the "crucial factor" of need pervades this case. Unemployment benefits are *"sustaining funds." Nash, supra* at 239. A suspension of

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34. Although welfare was potentially available to the aggrieved garnishee in *Sniadach,* the Court properly recognized that "as a practical matter," a prejudgment garnishment may "drive a wage earning family to the wall." *Sniadach v. Family Finance Co.,* 395 U.S. at 341-42.

unemployment benefits to *eligible workers* is unlikely to pass without leaving in its wake irreparable economic injury.

3. A prior hearing is indispensable in order to counteract the inherently arbitrary nature of the California suspension procedure.

An opportunity to be heard before benefits are suspended is in many respects even more appropriate in this case than in *Goldberg*. Unlike the welfare recipient in *Goldberg* who was initially found eligible for benefits but subsequently redetermined ineligible, the unemployment recipient before this Court has been found *eligible* for benefits in the last determination made by the relevant state agency. His weekly benefits have been interrupted, not by a neutral Departmental redetermination as in *Goldberg*, but instead, upon an appeal by an *adverse* third party, his former employer.[35] This procedure bears remarkable similarity to the process found unconstitutional in *Sniadach*. There an action by an adverse third party—the filing of a garnishment action—could "freeze" critically needed wages. In both cases, the aggrieved party is arbitrarily deprived of critical funds without consideration of the merits of his case.[36] Thus,

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35. An employer has an economic incentive to appeal an eligibility determination in his former employee's favor: to protect his reserve account. Indeed he has no reason not to appeal. *See, infra* at 52; *supra*, n. 11 at 20.

36. For a discussion concerning the tendency of certain employers to file unmeritorious appeals, see *Opinion of the Chairman, Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature* 82 (1945). The inherent arbitrariness of the California procedure is especially apparent in the case of a late appeal by an employer. As noted in n. 12, *supra* at ....., while good cause must be shown for a late appeal, *Calif. Unemp. Ins. Code* § 1328, benefits are, nonetheless, cut off immediately upon such an appeal, with the question of cause left for the appellate hearing many weeks later. If good cause is not found, the appeal is dismissed. Thus, even when an employer's appeal never reaches the merits, *eligible* unemployed workers are denied benefits for a median period of seven weeks. (A. 106).

under Section 1335, an *eligible* employee's benefits may cease to flow for a median period of seven weeks regardless of the strength of his claim, (A. 106).

Sixty-four percent of the appeals filed by employers in 1969 were decided in favor of their employees[37]—double the percentage of appeals ultimately won by welfare receipients in *Goldberg*. See *Kelly v. Wyman*, 294 F. Supp. 893, 901, (S.D. N.Y., 1968, three-judge court).[38] Thus, in 1969, $1,661,400 was found by State referees to have been wrongfully withheld from eligible employees. (J.S. App. C at 16.) As in *Goldberg*, retroactive benefits are made available to these claimants in a lump sum. However, the glaring inadequacy of retroactive unemployment benefits was clearly recognized by this Court in *Nash*, when it said: "even the hope of a future award of back pay may mean little to a man . . . faced with the immediate severance of sustaining funds." *Nash v. Florida Industrial Commission, supra* at 239. If eligible unemployed workers were afforded an opportunity to be heard before their benefits were suspended, this sum would have been available to them in the form of weekly unemployment benefits to help alleviate the critical problems caused by sudden unemployment. The following statement made by the Court in *Goldberg* applies equally well to unemployment compensation:

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination

37. J.S. App. C at 14; of the two individual appellees, Mrs. Hudson's eligibility determination was affirmed and Mrs. Java's was reversed by a State referee.

38. In *Goldberg*, 36 percent of the welfare recipients terminated without a prior hearing were found on appeal to have been improperly terminated. The court found this to be a "startling statistic." *Kelly v. Wyman, supra* at 901. Ironically, in the instant case the percentages are reversed making a prior hearing even more critical. As the Fifth Circuit stated in another context: "We do not abdicate our judicial role to statistics. But when figures speak, we must listen." *Hall v. St. Helena Parish School Board*, 417 F. 2d 801, 809 (5th Cir., 1969).

> evidentiary hearings are *indispensable* to that end. 397 U.S. at 265. (emphasis added).

Moreover, if prior hearings are mandated, the number of recipients winning appeals filed by employers would undoubtedly increase:

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the . . . bureaucracy. *Id.* at 264.

Without unemployment benefits, an *eligible* unemployed worker may be seriously handicapped in defending an appeal, by his former employer. Funds are necessary for contracting and preparing witnesses, and possibly even in retaining counsel to represent him at the hearing, which, of course, both sides are entitled to. Presumably, his former employer has tax-deductible funds available for all of these purposes.

While it applied welfare redistributive principles to the unemployment situation and attacked many of the same problems as public assistance, Congress clearly saw a basic distinction between unemployment and welfare—unemployment insurance was considered a "contractual right." *Report to the President, Committee on Economic Security, S. Hearings* at 1321-22; *Remarks of Representative Doughton,* 79 *Cong. Rec.* 5468 (1935). All of its recipients are wage-earners who have worked for the security it affords.[39]

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39. "Even though the employers in the first instance pay the contribution, . . . in the ultimate analysis it tends to rest upon the wage earner." *Statement of Alvin H. Hansen, Chairman of Subcommittee on Unemployment Insurance, Committee on Economic Security, S. Hearings* at 447; *See* Note, 73 *Yale L. J.* 357, 361 (1963); *Dialogue between Senator Black and Senator Wagner, S. Hearings* at 25; *Dialogue between Senator Black and Frances Perkins, S. Hearings* at 117-118; *Opinion of the Chairman, Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature* 82 (1945).

Unemployment benefits may not, therefore, be disbursed in an arbitrary manner.

In his concurring opinion in *Sniadach*, Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisites of procedural due process." *Sniadach v. Family Finance Co., supra* at 342. Since *Sniadach*, a prior hearing has been recognized as necessary to protect welfare recipients from arbitrary governmental action. *Goldberg v. Kelly, supra.* Unemployment compensation serves the same purposes for unemployed workers as public assistance serves for welfare recipients. Surely, due process provides the "working poor" with the same procedural safeguards.

B. THE INTERESTS OF THE STATE AND ITS EMPLOYERS DO NOT REQUIRE SUMMARY PROCESS.

1. The State's interests in suspending payment of unemployment benefits to eligible recipients pending appeal are much less substantial than those rejected as inadequate by the Court in Goldberg.

Only in "extraordinary situations" does summary procedure "meet the requirements of due process," *Sniadach v. Family Finance Corp., supra* at 339.[40] A brief review of the kinds of "extraordinary situations" in which due process has been held to permit summary procedures reveals that they bear no resemblance to the State's interest

40. In his concurring opinion in *Sniadach*, Mr. Justice Harlan used the phrase "[a]part from special situations" and "essential to protect a vital government interest." 395 U.S. at 343. The cases he listed as examples of such situations are markedly similar, and in two cases, identical to those cited by the Court as "extraordinary situations." *See e.g., Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950); *Fahey v. Mallonee*, 332 U.S. 245 (1947).

in this case: *Ewing v. Mytinger and Casselberry Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of unfit food); *Yakus v. United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (access to military installation); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (management of loan association injuring public). No similar interests are presented by the State in this case.

The principal purpose of the suspension of benefits pending appeal is the prevention of possible overpayments in the event that a determination of eligibility is reversed. However, because of the thoroughness of the initial eligibility determination and the patent arbitrariness of Section 1335, 64 percent of the 8,315 employer appeals filed in 1969 were won by *employees*. (J.S. App. C at 14). Thus, of the $2,594,280 withheld by the State pending employer appeals, $1,661,400 was determined to have been wrongfully withheld from eligible employees. Consequently, if benefits had not been suspended from eligible employees pending employer appeals, overpayments would have amounted to only $932,880.

Appellants state:

> should the employer prevail on the appeal, the money that the claimant has received during the pendency of the appeal is essentially unrecoverable. (Appellants' Brief at 15-16.)

Yet appellants ignore their own statistics which reveal that only 36 percent of amounts paid to ineligible recipients is not recouped; *64 percent of all overpayments are recouped*

by the Department. (J.S. App. C at 16-17).[41] Thus, the possible annual cost to the State of affording justice to its

41. The Department's high rate of recoupment is not surprising. While welfare recipients "are likely to be judgment-proof," *Goldberg v. Kelly, supra* at 266, unemployment recipients are by definition "employable," *Calif. Unemp. Ins. Code* §§ 1253, 1257-59, and likely to have assets once reemployed. In its decisions in *Nash v. Florida Industrial Commission, supra* at 239, n. 4, and *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 365, n. 1, (1951), the Court made specific reference to the ability of states to recoup erroneous unemployment payments.

The State has been granted ample powers to recoup erroneous overpayments. Whenever it is determined that a claimant was at fault, either through willful action or by virtue of negligence, *including omission of a material fact,* the Department is empowered to assess the overpayment against the claimant and institute collection efforts. *Calif. Unemp. Ins. Code* §§ 1375-1380. It has authority to seek voluntary repayment, file a civil action to recover the overpayment, or offset the amount of the overpayment against any future unemployment benefits to which the claimant may become entitled under either the unemployment or disability insurance programs. *Calif. Unemp. Ins. Code* § 1379.

The ability to offset overpayments against future unemployment benefits is indeed a powerful club. About 50% of male claimants and 36% of female claimants file more than one claim in the same benefit year. *Report No.* 416 at 3,23. The Department, therefore, is a rather well secured creditor.

The State is also armed with criminal sanctions. *Calif. Unemp. Ins. Code* §§ 2101, § 2110, § 2113. These provisions make it a misdemeanor to willfully make a false statement or representation or knowingly fail to disclose a material fact to obtain any payment under the Act. By encouraging a claimant to make a full disclosure of all facts relating to his claim at the outset, they serve to minimize erroneous payments. Upon conviction and sentencing for offenses under *Calif. Unemp. Ins. Code* § 2101, the defendant may be ordered, as part of the terms of his probation, to make restitution to the Department in the amount of any overpayment resulting from his misrepresentation. *See also, Calif. Unemp. Ins. Code* § 2113. The effectiveness of these sanctions in discouraging misrepresentation by claimants at the eligibility determination is borne out by the record on appeal. In 64% of the appeals filed by employers, the Department's determination of eligibility is affirmed. J.S. App. C at 14.

In asserting that *Calif. Unemp. Ins. Code* § 1375 prohibits recoupment in the absence of fraud or misrepresentation by a claimant (Appellants' Brief at 16, n. 10), the State makes no reference

eligible unemployment recipients is not $18,000,000 (Appellants' Brief at 16), but rather $335,836. As $416,838,000

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to the decisions of the California Unemployment Insurance Appeals Board interpreting this statute. They reveal that the only requirement for recoupment is not willful fraud, but only a limited amount of "fault" on the part of the claimant.

In *In The Matter of Eveard A. Goding, California Unemployment Insurance Appeals Board, Precedent Benefit Decision No.* P. B-47 (1969), a discharged claimant received unemployment insurance while appealing his employer's right to dismiss him. He was subsequently reinstated in his job by a labor arbitrator and awarded back wages, less what he had already received in unemployment compensation. The Board expressly found that "the claimant in this matter was free from misrepresentation, willful non-disclosure or fraud" *Id.* at 7. However, he was required to repay his benefits because he received back wages for the same period. His "fault" (and that of his union) involved an erroneous interpretation of *Calif. Unemp. Ins. Code* § 1265, which permits an employee to receive supplemental unemployment compensation under a privately financed plan. With regard to the prohibition of recoupment where "equity and good conscience" would be offended, (*Calif. Unemp. Ins. Code* § 1375) the Board refused to waive Goding's overpayment despite the fact that his award for back wages was specifically reduced by the amount of unemployment benefits he received. With knowledge of the Act's requirements, he would have been able to obtain an award for full back wages. As it was, he lost both unemployment insurance and back pay. *See California Unemployment Insurance Appeals Board Benefit Decision No. 5960,* and *Miscellaneous Decision No.* 431.

Furthermore, a decision by an appeals referee in favor of an employer usually involves an automatic finding of fault on the part of an employee. Most employer appeals arise under Sections 1253, 1256 and 1257 of the California Unemployment Insurance Code. They require a claimant to be able and available for work, if offered; not to have left his last employer voluntarily without good cause; not to have been fired for misconduct; to make no misrepresentations to secure benefits; and to accept suitable employment, if offered. An adverse finding on any of these issues presupposes fault on the part of the claimant in obtaining benefits. Thus, with most overpayments, Section 1375 does not apply, leaving the State free to use its recoupment powers.

Clearly, the Department does not consider overpayments resulting from the decision in this case beyond its powers of recoupment.

was paid out by the State in benefits in 1969,[42] the continuance of weekly benefit payments pending employer appeals would have necessitated an increase in disbursements of only .08 percent. Moreover, since the California Unemployment Fund contained $1,304,868,000[43] at the close of 1969, it is clear that a loss of $335,836 in overpayments would have had a truly *de minimis* effect (.02%) on the solvency of the Fund.

Affording hearings to eligible recipients before their benefits are suspended can be expected to reduce this minimal amount even further. Assured the steady flow of unemployment benefits, many *eligible* recipients will be in a substantially better position to defend their eligibility determinations against an employer's appeal. A rise in the percentage of employees who successfully defend employer appeals consequently decreases the amount of overpayments pending appeal. Increasing an employee's ability to defend his eligibility insures the integrity of the appellate process and thereby furthers both the federal and State purpose in legislating unemployment compensation—*i.e.*, providing benefits to *all* eligible employees, thus "reduc-[ing] . . . the suffering caused [by involuntary unemployment] to a minimum." *Calif. Unemp. Ins. Code* § 100. *See Goldberg v. Kelly, supra* at 266.

Since July it has routinely notified all recipients receiving benefits pending an employer's appeal:

> An appeal has been filed from the local office, or referee, [sic] decision holding you eligible for unemployment insurance benefits. The Department will continue to pay these benefits to you, pending the result of the appeal. However, if the referee, or the Unemployment Insurance Appeals Board, finds that you are not eligible, you will have to repay these benefits to the Department. *State of California, Department of Human Resources Form* DE 6315 (adopted July, 1970).

42. *U.S. Department of Labor, Bureau of Manpower Administration, Unemployment Insurance Statistics, Table* 6 (March, 1970).

43. This figure represents an increase of $170,354,000 from the previous year. *Id.*

The payment of unemployment benefits pending an employer's appeal would tend to augment the Unemployment Fund in another respect. By providing an unemployed worker with funds with which to search for new employment, the Department would be contributing to a decrease in his period of unemployment—thereby decreasing the number of weeks in which it is necessary for him to receive unemployment benefits.

The State has additional means by which to minimize the possibility of overpayments. As the Court noted in *Goldberg:*

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. 397 U.S. at 266.

By increasing the number of appellate referees, the State could shorten the seven week median appeal period and eliminate the possibility of sizeable overpayments: the entire system then could operate more equitably. Since State administrative costs are reimbursed by the federal government and are not permitted to be drawn from the Unemployment Fund. (42 U.S.C. 503(a)(5), 1103(c)(1)), the hiring of additional referees would have no effect on the amount of money available for the payment of unemployment benefits.

The State suggests that if the appellees prevail, "frivolous appeals" would result: "By appealing, the employee would be able to stretch out his benefits." (Appellants' Brief at 17, n. 13). The point is totally without merit. Unlike the situation in *Goldberg,* all appeals under Section 1335 are filed by *employers;* the recipients whose benefits are suspended without a prior hearing have been found *eligible* by the State.

Finally, suspending benefits to eligible employees pending employer appeals is not necessary to encourage employers to "police" the system by challenging initial eligibility determinations. Inasmuch as 64 percent of the appeals filed by employers are unsuccessful, it is apparent that such appeals are not critical to the system's integrity. Moreover, the suspension of benefits pending an employer's appeal has no relationship to his incentive to appeal. Employers are concerned, and rightfully so, with protecting their reserve accounts which are debited when their employees qualify for unemployment benefits. But under Section 1335, if an employer succeeds in reversing an eligibility determination at any appellate level, his reserve account is immediately credited with all monies paid to his employee. Affording employees an opportunity to be heard before suspending their benefits, therefore, would in no way decrease an employer's incentive to challenge eligibility determinations that, in his opinion, have been incorrectly decided.

In *Goldberg*, where prior hearings presented the State with fiscal and administrative problems of a much greater magnitude, the Court stated:

> the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. 397 U.S. at 266.

Likewise, in this case, no "extraordinary" or "special" situation justifies denying unemployed workers an opportunity to be heard before their benefits are cut off.

2. The payment of unemployment benefits to eligible employees pending an employer's appeal would not adversely affect the legitimate interests of the State's employers.

In order to distinguish this case from *Goldberg*, the State suggests that "the central issue here is whether the em-

ployer's right to be heard before his property is taken" is outweighed by the prejudice to a suspended claimant pending appeal. (Appellants' Brief, 11)

In the words of Mr. Justice Frankfurter, "This is a horse soon curried." *Olberding v. Illinois Central R. Co.*, 346 U.S. 338, 340 (1953). No such dilemma confronts the Court. The amount of taxes contributed by each employer to the Unemployment Fund varies directly with the number of his former employees who qualify for unemployment benefits. But under the California scheme, an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is *not* charged with any benefits paid to his former employee pending his appeal. *Calif. Unemp. Ins. Code* §§ 1335, 1380. He has *no* responsibility for recoupment. Thus, regardless of whether benefits to his former employees are suspended pending his appeal, an employer is assured of a complete opportunity to be heard *before* effective action is taken against him.

Indeed, providing eligible recipients an opportunity to be heard before the suspension of benefits, would serve only to make the appellate process fair to both sides; employers would be caused no harm and employees would have an opportunity to be heard before their benefits are suspended.

The interest of the State's employers in preserving the solvency of the Unemployment Fund[44] does not justify

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44. Any unrecouped overpayments resulting from payments of benefits made to employees whose eligibility determinations are reversed upon appeal are made from a Balancing Account for which all employers in the State are equally liable. It must be noted, however, that while unemployment funds are collected from employers, the burden is borne indirectly by both employees and consumers. *See* n. 39, *supra* at 44.

depriving *eligible* recipients of critically needed benefits by an *ex parte* process. Their interest in the Fund is no different from the interest of any other taxpayer group which is composed of less than the general public and is concerned about the use of its tax contributions. As this Court stated in *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951):

> Payments of unemployment compensation were not made to the employees by respondent [his former employer] but by the State out of State funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent but to carry out a policy of social betterment for the benefit of the entire State.

Homeowners paying property taxes are not entitled to contest every school or sanitation expenditure in an evidentiary hearing. Nor are those charged with a motor vehicle tax entitled to a separate evidentiary hearing for every expenditure regarding highways. Likewise the State is not required to grant employers as a class a *Goldberg*-type evidentiary hearing whenever an individual employee receives unemployment benefits.[45]

Whatever interest the State's employers may have regarding the prevention of unrecouped overpayments in order to avoid the possibility of a future tax increase is adequately protected by the initial eligibility determination. As Mr. Justice Harlan stated in his concurring opinion in *Sniadach v. Family Finance Co.*:

> [D]ue process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the

45. Since every employer has an equal interest in the Balancing Account, the State's position would require that any employer in the State be permitted to appeal the eligibility determination of any unemployed worker.

> validity, *or at least the probable validity,* of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use. 395 U.S. at 343 (Harlan J. concurring) (emphasis added).

Considering the wholly speculative nature of the employers' interest in avoiding future taxes, the opportunity to be heard provided an individual employer at the initial eligibility determination fully meets due process criteria.[46]

Inasmuch as the Unemployment Fund contained $1,304,868,000 at the end of 1969,[47] a possible loss of $335,836 (.02%) due to overpayments pending employer appeals is hardly likely to affect the State's 300,000 employers. On the contrary, although the injunction issued by the court below has been in effect since May 24, 1970, the Department reported in September, 1970 that the Fund has never been healthier. In an article in its *Newsletter,* headlined "Low Tax Rate Seen For 1971," the *Department* reveals that the balancing account tax—i.e., the general fund, not

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46. In *Gange Lumber Co. v. Rowley,* 326 U.S. 295 (1945), this Court held that an employer's interest in protecting against a possible tax increase was not a litigable interest. *Accord, Aero Design & Engineering Co. v. Oklahoma Employment Security Commission,* 151 F.Supp. 844 (W. D. Oklahoma, 1956, three-judge court), *aff'd,* 353 U.S. 943 (1957). *See also: Western Hardwood Lumber Co. v. California Employment Commission,* 58 C. A. 2d 403, 137 P. 2d 76 (1943). As one authority notes, comparative studies indicate that employers are much more likely to file appeals in States with experience ratings (i.e., the employer's tax rate is based on the number of his former employees found eligible for benefits) than in States in which all employers pay under an equal tax rate. *Becker, The Problem of Abuse in Unemployment Benefits* 334 (1953). Since employers have shown marked disinterest in filing appeals solely to protect against a future tax increase, this interest cannot possibly serve to justify cutting off an eligible employee's benefits by summary process.

47. *U. S. Department of Labor, Bureau of Manpower Administration, Unemployment Insurance Statistics, Table* 6 (March, 1970).

attributable to any single employer, which would be responsible for any unrecouped overpayments resulting from payment of benefits to eligible employees pending appeal—"will be *a new low* of .6 percent." *California Human Resources Department Newsletter,* September, 1970. (emphasis added).

Finally, as businessmen and citizens, employers also have an interest in assuring the payment of unemployment benefits to *eligible* employees at the earliest possible time.[48] Thus, the employers, as well as the State, have an interest in providing *eligible* employees with an opportunity to be heard before the suspension of their unemployment benefits.

CONCLUSION

The judgment below should be affirmed.

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Respectfully submitted:

EUGENE M. SWANN
JOHN DIAZ COKER
JAMES M. KLEIN
TERRENCE RICHARD VAN OSS
CONTRA COSTA LEGAL SERVICES FOUNDATION
337 Tenth Street, P. O. Box 1669
Richmond, California 94801

KENNETH F. PHILLIPS
STEPHEN P. BERZON
NATIONAL HOUSING & ECONOMIC DEVELOPMENT LAW PROJECT
Earl Warren Legal Institute
University of California
Berkeley, California 94720

Attorneys for Appellees

48. Unemployment insurance was designed to protect purchasing power and stabilize the labor market—two distinctive employer concerns. *Supra* at 15-18.